

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

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date: August 24, 2010

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(Small Business/Self-Employed), Salt Lake City

from: Charles A. Hall  
Senior Technician Reviewer  
(Procedure & Administration)

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subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer	=
Tax Year	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Amount 1	=
Amount 2	=
Amount 3	=

### ISSUES

1. Whether section 7502 of the Code applies to an amended return that is mailed on the day the statute of limitations for assessment expires but is received after that date.

2. Whether section 6501(c)(7) applies to Taxpayer's Tax Year so that the period for assessing additional tax does not expire before the 60th day after the Service received the Taxpayer's amended return for the Tax Year.

3. Whether a payment made by Taxpayer with its amended return is an overpayment?

4. Whether the Service can bifurcate an amended return into portions that increase tax and portions that decrease tax.

### CONCLUSIONS

1. Section 7502 does not apply to amended returns because amended returns are not returns required to be filed under internal revenue laws.

2. Section 6501(c)(7) does not apply to Taxpayer's Tax Year.

3. The payment made by Taxpayer with its amended return is an overpayment.

4. The Service may not bifurcate an amended return into portions that increase tax and portions that decrease tax.

### FACTS

For its Tax Year, Taxpayer filed a request and received approval for an extended return filing date of Date 2. Taxpayer mailed its return with a postmark date of Date 1, one day before the extended due date, Date 2. Service records show that the return was date stamped as received by the Ogden Service Center on Date 3, nine days after the extended due date.

Exactly three years after Date 1, Taxpayer filed an amended return, Form 1120X, for its Tax Year, with a postmark date of Date 4. The amended return was date stamped as received by the Service Center three days later on Date 5. The amended return indicated that Taxpayer had an additional tax liability of Amount 1 for the Tax Year, and Taxpayer included a check for this amount with its amended return. The amended return contained one adjustment that increased Taxpayer's income by Amount 2 and two adjustments that decreased Taxpayer's income by Amount 3.

On Date 6, the Service mailed Taxpayer a letter stating that it could not assess the tax shown on Taxpayer's amended return because the statute of limitations for its assessment had expired. Taxpayer responded with a letter dated Date 7 that contested the Service's determination and noted the amended return was postmarked timely on Date 1.

### LAW AND ANALYSIS

#### Issue 1:

Section 7502(a)(1) provides that "[i]f any return, claim, statement, or other document required to be filed" is received after the date prescribed in a provision of the internal revenue laws then "the date of the United States postmark" of the mailed items "shall be deemed the date of delivery." Additionally, section 7502(a)(2) provides the postmark rule applies to prescribed dates for filing "including any extension granted for such filing."

Section 301.7502-1(b)(1) of the regulations defines the term "document" for purposes of the postmark rule to mean any return, claim, statement, or other document required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws.

Section 7502 applies only to returns "required to be filed." The treatment of a timely mailed return as timely filed does not apply to timely mailed amended returns that show additional tax due because these returns are not "required to be filed" by any internal revenue laws. Cf., Estate of Lewis v. Commissioner, T.C. Memo, 1988-36 (consent form to extend time to assess is an agreement and is not a document "required to be filed"; section 7502 timely mailing rule does not apply) ; Myers v. Commissioner, T.C. Memo. 1988-306 (same). However, section 7502 would apply to an amended return that included a claim for refund because taxpayers are required under the internal revenue laws to file a claim in such cases. I.R.C. § 6511<sup>1</sup>; see also Treas. Reg. §§ 301.6402-3(a)(5)<sup>2</sup> and 301.7502-1(b)(2).

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<sup>1</sup> Section 6511 provides time limitations within which a taxpayer must file a claim for refund.

<sup>2</sup> Treas. Reg. § 301.6402-3(a)(5) provides that a properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of § 301.7502-1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed. A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed.

The case, Jacobson v. Commissioner, 73 T.C. 610 (1979), however, offers the possibility of a contrary rule. In Jacobson, the Service mailed a notice of deficiency to the taxpayer on February 11, and it received from the taxpayer an amended joint return on February 16. The taxpayers, however, claimed that the amended return was mailed on February 11, but could produce no evidence to substantiate this claim. Regarding section 7502, the court stated that it “held” that any return means “any return.” That is, a plain language reading of the statute supports the thesis that an amended return is contained within the definition of the term “return.” The court noted that the Service had offered no evidence to support its claim that section 7502 does not apply to amended returns, but since the taxpayer could produce no evidence to prove that he mailed his amended return on February 11, the court ruled in favor of the Service. It is not clear from the facts of this case whether the amended joint return in question showed additional tax due or an overpayment.

The court seemed to focus on the phrase “required to be filed” and read that to be only modifying “other document” rather than “any return, claim, statement, or other document.” If that was the case then it is possible that an amended return could be considered “any return.” But this conclusion ignores both the nature of an amended return and the regulations under section 7502. Even though the Commissioner administratively permits the use of amended returns, the filing of amended returns is not a matter of right because there is no statutory provision expressly authorizing them to be filed. Badaracco v. Commissioner, 464 U.S. 386, 393, (1984) (citing Hillsboro National Bank v. Commissioner, 460 U.S. 370, 380, n. 10 (1983) (the Internal Revenue Code does not explicitly provide either for a taxpayer's filing, or for the Commissioner's acceptance, of an amended return; instead, an amended return is a creature of administrative origin and grace); Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977). Acceptance of amended returns has repeatedly been held to be a matter which is within the discretion of the Commissioner. Id. at 1117; Miskovsky v. United States, 414 F.2d 954, 955 (3d Cir. 1969); Terrell v. Commissioner, T.C. Memo. 1986-507. Additionally, as indicated above, Treas. Reg. § 301.7502-1 adopts the position that “required to be filed” modifies more than just “document” by defining document as “any return, claim, statement, or other document required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws.” Thus, the postmark rule of section 7502 does not apply to an amended return that is received after the limitation period and shows additional tax due.

## Issue 2:

Section 6501(a) provides that, with certain exceptions, the amount of any tax imposed by title 26 shall be assessed within three years after the return was filed, whether or not the return was filed on or after the dated prescribed for its filing. One of these exceptions is section 6501(c)(7), which provides that the period for assessment of any tax is extended by sixty days if the Secretary receives from the taxpayer within the 60-

day period ending on the day on which the time prescribed for the assessment of any tax imposed by subtitle A would otherwise expire, a written document signed by the taxpayer indicating the taxpayer owes additional tax.

Because, as discussed above, section 7502 does not apply to amended returns, Taxpayer's amended return for the Tax Year was filed on Date 5, the date the amended return was delivered to the Ogden Service Center. Thus, Taxpayer's amended return for the Tax Year was not filed within the 60-day period ending on the day on which the time prescribed for the assessment of tax would otherwise expire. Accordingly, section 6501(c)(7) does not apply to Taxpayer's Tax Year and any additional tax for the Tax Year must be assessed within three years from the date that the original return was filed.<sup>3</sup>

### Issue 3:

Section 6401(a) provides that the term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

Section 6402 provides that in the case of any overpayment, within the applicable period of limitations, the Secretary may credit the amount of the overpayment, including any interest, against any liability for an internal revenue tax of the person making the overpayment.

Since Taxpayer's Form 1120X and its accompanying payment was received by the Service after the expiration of the statute of limitations for assessment, the amount of the payment is an overpayment pursuant to section 6401(a), which entitles Taxpayer to an offset or refund under section 6402(a). See Rev. Rul. 85-67.

### Issue 4:

The untimely Form 1120X cannot be broken down into component adjustments which are either favorable or unfavorable to the Service. Taxpayer's Form 1120X ultimately provided for an increased tax liability, even though it included multiple adjustments that both increased and decreased Taxpayer's taxable income. We have previously explained – and case law supports – that when a taxpayer submits an amended return that includes adjustments both favorable and unfavorable to the Service, the Service cannot accept only some of the taxpayer's self-reported adjustments because these adjustments are only components of a single tax liability. See Penn Mutual Indemnity Co. v. Comm'r, 32 T.C. 653, 668 (1959) (concurring opinion)(a return submitted by a taxpayer is a self-assessment of the tax which he agrees or concedes is due); Kingston

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<sup>3</sup> Section 7502 applies to this original return because it is a return that is required to be filed. Although the return was delivered on Date 3, it was postmarked Date 1, before the extended due date of Date 2. Thus, Date 1 is the filing date of the return for the Tax Year.

Prod. Corp. v. United States, 368 F.2d 281, 287 (Ct. Cl. 1966) (upward and downward adjustments in a return submitted by a taxpayer are only components of a single tax liability and cannot be unbundled). Therefore, it would be improper for the Service to accept only the part of Taxpayer's Form 1120X that is favorable to the taxpayer and interpret that portion as a claim for refund, while at the same time disregarding the larger portion of Taxpayer's Form 1120X as an untimely self-assessment. The entire Form 1120X must be rejected as untimely.

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